IN THE COURT OF APPEALS OF IOWA

No. 9-089 / 98-0302

STATE OF IOWA,
Appellee,

vs.

ROYCE E. IMHOFF,
Appellant.

FILED
MAY 26 1999
CLERK SUPREME COURT

Appeal from the Iowa District Court for Clarke County, David L. Christensen, Judge.

Royce Imhoff appeals his convictions and sentences, following a jury trial, for two counts of second-degree sexual abuse. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, and John D. Lloyd, County Attorney, for appellee.

Heard by Streit, P.J., and Vogel and Zimmer, JJ. Sackett, C.J., takes no part.

ZIMMER, J.

Defendant-Appellant Royce Imhoff appeals his convictions and sentences, following a jury trial, for two counts of sexual abuse in the second degree. He contends: (1) the district court erred in ruling his confession was admissible; (2) there was insufficient evidence to support the jury's verdict; (3) the district court abused its discretion by failing to set forth reasons for sentencing him to consecutive sentences; and (4) he was denied effective assistance of counsel.

We do not think the present case is one in which the claim of ineffective assistance of counsel should be reached on direct appeal. Accordingly, we reserve Imhoff's claim of ineffective assistance of counsel for postconviction proceedings. Because we find no merit in the other three assignments of error, we affirm the judgments of the district court.

I. Background Facts and Proceedings. Royce and Vonna Imhoff are the parents of Victoria, who was eleven years of age at the time of this offense. On May 29, 1997, Vonna was preparing dinner. She sent Victoria upstairs to wake her father. At approximately 5:00 p.m. Vonna went upstairs to inform Royce and Victoria dinner was ready. As she walked into the bedroom, she observed Victoria on top of Royce's head and shoulders with her shorts unfastened. Royce appeared to be performing oral sex on Victoria.

At approximately 9:00 p.m. that evening, Vonna appeared at the home of friends crying hysterically. She told them she had caught Royce performing oral sex

on Victoria. Her friends did not inform the police, but instead called the Department of Human Services (DHS).

On May 30, 1997, a DHS investigator and a police officer interviewed Vonna regarding the allegations. Royce was subsequently arrested and taken to the police station for interrogation. Officers read him his Miranda rights and he affirmed his understanding of those rights. He was then shown a three-page complaint which summarized the allegations against him. After reading the complaint, Imhoff stated the allegations were probably true. He then gave a complete statement outlining his version of the events. He admitted that he had been sexually active with Victoria for several months and that he was performing oral sex on Victoria when caught in the act by Vonna.

Imhoff was formally charged by trial information with three counts of sexual abuse in the second degree, in violation of Iowa Code section 709.3(2). A motion to suppress was filed requesting the suppression of any oral or written statements made by the defendant during the custodial interrogation occurring May 30, 1997. Following hearing, the motion was denied by the district court.

Jury trial commenced in December 1997. After the evidence was presented, the district court withdrew count I from the jury's consideration based on lack of corroboration of defendant's confession. The jury returned a verdict of guilty to counts II and III. Imhoff was sentenced to two terms of incarceration not to exceed twenty-five years each. The sentences were ordered to run consecutively.

II. Motion to Suppress. Prior to trial, the defendant filed a motion to suppress the admissions he made during his custodial interrogation. He claims he could not and did not voluntarily, knowingly, and intelligently waive his Miranda rights at any time prior to or during the custodial interrogation on May 30, 1997. Defendant asserts he was under the influence of drugs and alcohol, sleep deprived, and possibly promised leniency.

According to his testimony, Imhoff arrived home from work at 7:45 a.m. on May 30. He testified he drank "an ounce maybe" of vodka after arriving home. At approximately 10:00 a.m., he took two Tylenol 3 prescription tablets for pain. Imhoff testified that between 10:30 and 11:00 a.m., he drank approximately six ounces of rum.

The police arrived at Imhoff's home at approximately 1:30 p.m. to execute a warrant for his arrest. Officer Brannon, a police veteran of sixteen years with considerable experience in alcohol-related arrests, stood within a foot of the defendant at the time of his arrest. Though Imhoff appeared tired, the officer observed the defendant had no difficulty walking or talking. He did not smell alcohol and observed nothing in defendant's demeanor which indicated he was intoxicated. The smell of alcohol on the defendant was nonexistent even in the enclosed environment of the officer's squad car.

Officer Carole Rayburn spoke with the defendant's wife before leaving to execute the arrest warrant. She asked Vonna whether there were any alcohol or drug-related problems in the household. Vonna responded that there were none. She

made no mention of the fact her husband had been drinking that morning or that he was taking prescription medicine. She did warn that her husband was a sound sleeper and would probably not respond to a knock at the door. Her warning proved true, as the defendant did not answer the door and a phone call was required to rouse him from his sleep. Officer Rayburn witnessed the defendant walk to the squad car without difficulty after being handcuffed.

Officer Rayburn also observed the defendant after he was transferred to the station for interrogation. At the station, his eyes were clear and his speech unimpaired. Rayburn stood within two feet of the defendant and did not detect the odor of alcohol. Officer Charles Beeker searched Imhoff when he was arrested at his home. He detected no odor of alcohol even in those close quarters. At the station, Beeker read a standard Miranda waiver form to Imhoff. After each question, he asked whether the defendant understood. Imhoff responded affirmatively after each question. After the form was read to the defendant, Beeker inquired whether he had any questions. Imhoff answered that he did not and signed the waiver.

After waiving his rights, Imhoff was handed a three-page complaint to read. While reading the complaint, he stopped momentarily to ask what the phrase "digital penetration" meant. The term was explained and he seemed to understand. After reading the complaint, Imhoff stated the complaint was "probably true."

An interrogation followed. During the interview, Imhoff provided specific detail about sexual acts he committed with Victoria. Imhoff then authored a handwritten statement that took him less than ten minutes to complete.

During the booking process which followed his interview, the jailer observed no signs of intoxication by drugs or alcohol. Imhoff was asked about any medical conditions that needed treatment or medication and he indicated there were no such current conditions.

We conclude the evidence is overwhelming that Imhoff suffered from no condition that would have impaired his ability to voluntarily and intelligently waive his constitutional rights. Intoxication will render a waiver involuntary when intoxication reaches the extent of incoherence or mania. *See Van Hoff v. State*, 447 N.W.2d 665, 673 (Iowa App. 1989). The record does not indicate Imhoff was intoxicated, much less incoherent or manic.

III. Sufficiency of the Evidence. The defendant contends the evidence was insufficient to support a conviction for the second count of second-degree sexual abuse.

When considering a sufficiency of the evidence challenge, we examine the evidence in the light most favorable to the State, and consider all evidence presented at trial, not just the evidence which supports the verdict. *See State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980). We make all legitimate inferences and presumptions that may fairly and reasonably be deduced from the evidence in the record to support the verdict. *See State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984). We will uphold the verdict of the jury when substantial evidence exists on the record to support the verdict. *See State v. Aldape*, 307 N.W.2d 32, 39 (Iowa 1981). Evidence meets the threshold criteria of substantiality if the evidence would have convinced a rational

fact finder that the defendant is guilty of the crime charged beyond a reasonable doubt. *See State v. LeGear*, 346 N.W.2d 21, 23 (Iowa 1984).

The defendant's argument implicates Iowa Rule of Criminal Procedure 20(4), which provides:

> The confession of the defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that the defendant committed the offense.

Iowa R. Crim. P. 20(4). This rule changed prior law which required additional evidence that an offense was committed by someone, but not necessarily the defendant. *See State v. Origer*, 418 N.W.2d 368, 370 (Iowa App. 1987). "Corroboration need not be strong or need it go to the whole case so long as it confirms some material fact connecting the defendant to commission of the offense." *Id.* (citing *State v. White*, 319 N.W.2d 213, 214 (Iowa 1992)). The existence of a corroborative fact is a question of law for the court, while the sufficiency of that evidence is a question of fact ordinarily for the jury. *Id.* The balance of the evidence is examined to determine if some fact corroborates the confession. *See State v. Origer*, 418 N.W.2d at 370. A confession is distinguished from an admission in that a confession comprises the whole of a criminal charge whereas an admission relates only to a particular fact or circumstance thereby. *See State v. Capper*, 539 N.W.2d 361, 364 (Iowa 1995).

Count II of the original trial information alleged that sexual abuse occurred in March of 1997. After the close of evidence, the State moved to amend the trial information to conform to the proof presented by changing the date in count II from

March to April of 1997. Defendant's attorney did not object and the jury was instructed that count II involved April of 1997.

The defendant's confession included the following statement, "In late April, I tried using baby oil on her to penetrate, but I didn't get very far before I ejaculated." To establish the offense of sexual abuse as charged in count II, there must be corroboration for this portion of defendant's confession.

Dr. Mark Easter conducted a colposcopic examination of the victim. He noted a small scar just inside the posterior forchette which was well healed. This finding was significant for him because it was consistent with either an attempted penetration or some type of blunt trauma causing the injury. He described the injury as typical of an unsuccessful attempt to penetrate through intercourse. The scar was estimated to be from three days to six months old. While consistent with digital penetration, the location of the injury is more consistent with penile penetration. Digital penetration more frequently causes injury on the opposite side of the vagina wall. The medical history obtained quoted a statement from the victim that identified her father as the perpetrator of abuse. The victim directed the doctor to areas that had been touched by her father, including the area where the scar was found.

Corroborative evidence may be direct or circumstantial. *See State v. Bugely*, 562 N.W.2d 173, 176 (Iowa 1997) (citing *State v. Vesey*, 241 N.W.2d 888, 890 (Iowa 1976)). The evidence "need not be strong and need not be entirely inconsistent with innocence." *Id.* (quoting *State v. Dickerson*, 313 N.W.2d 526, 529 (Iowa 1981)).

The defendant's argument that the corroborative evidence was vague goes to the weight of the evidence. The weight of the evidence, however, is a question for the jury. We find sufficient corroboration was presented through the testimony of Dr. Easter to allow count II to be considered by the jury.

IV. Sentencing. The defendant contends the trial court abused its discretion in sentencing him to two consecutive twenty-five-year terms of incarceration. Imhoff requested a new sentencing hearing with directions that the sentences be ordered to run concurrently.

Our review is for correction of errors at law. *See* Iowa R. App. P. 4; *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996). Sentencing decisions of the district court carry a strong presumption in their favor. *See State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995). Where, as here, a defendant does not assert that the imposed sentence is outside the statutory limits, the sentence will be set aside only for an abuse of discretion. *See State v. Neary*, 470 N.W.2d 27, 29 (Iowa 1991); *State v. Black*, 324 N.W.2d 313, 315 (Iowa 1982). An abuse of discretion is found only when the sentencing court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *See State v. Neary*, 470 N.W.2d at 29.

When selecting a particular sentence, the court must consider all the relevant factors to determine the appropriate sentence under the circumstances. *See State v. Hildebrand*, 280 N.W.2d 393, 396 (Iowa 1979). The minimal essential factors to be considered when exercising discretion include the circumstances of the case, the nature of the offense, the defendant's age, character, propensities, and chances of

reform. *See State v. Dvorsky*, 322 N.W.2d 62, 67 (Iowa 1982). The court must actually exercise its discretion and examine these factors. *See State v. Hildebrand*, 280 N.W.2d at 396. No one factor is determinative. *See State v. Kelley*, 357 N.W.2d 638, 640 (Iowa App. 1984). After considering all relevant sentencing factors the court must exercise the sentencing option that would best accomplish justice for both society and the individual defendant. *Id.*

In this case, two consecutive sentences of up to twenty-five years each were imposed. If a defendant has been convicted of distinct and separate offenses, the sentencing court has the authority to order "separate and distinct sentences which are cumulative, and are to run consecutively." *See State v. Criswell*, 242 N.W.2d 259, 260 (Iowa 1976). The reasons for imposing consecutive sentences must be stated separately. *See State v. Delaney*, 526 N.W.2d 170, 178 (Iowa App. 1994); *see also* Iowa R. Crim. P. 22(3)(d) ("The court shall state on the record its reasons for selecting the particular sentence."). The reasons, however, need not be specifically tied to the consecutive sentences, "but may be found in the particular reasons cited for the over-all sentencing plan." *See State v. Delaney*, 526 N.W.2d at 178. All parts of the record are examined to make the determination whether appropriate reasons are stated. *Id.* The explanation for selecting a particular sentence need not be detailed, but enough must be provided to permit review of the trial court's exercise of its discretion. *See State v. Johnson*, 445 N.W.2d 337, 343 (Iowa 1989).

We conclude from the record that the trial court carefully considered the sentencing options in this case. The court noted that the minimum sentence on a

single count would keep the defendant incarcerated until Victoria had grown into her mid-thirties. The court considered the effect the offense had on others and the relationship between the defendant and the victim. The court expressed concern that sufficient time had passed after the first offense to allow defendant to reflect on his conduct, but that defendant had, nevertheless, committed a second, similar offense. Finally, the sentencing court concluded the need to adequately protect the public, provide opportunity for rehabilitation, and deter other offenders warranted consecutive sentences. We find the district court's rationale adequate to demonstrate an appropriate exercise of discretion.

V. Ineffective Assistance of Counsel. On appeal, Imhoff claims his trial counsel was ineffective for failing to object to hearsay evidence presented at trial. He also contends he was prejudiced by his trial counsel's failure to move to enlarge the findings made by the trial court regarding his motion to suppress. Pursuant to the analysis followed in *State v. Risdal*, we determine Imhoff's claims should not be reached on direct appeal. *See State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987). We thus preserve Imhoff's ineffective assistance of counsel claims for postconviction relief proceedings.

AFFIRMED.